

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

KIM SMITH,	:	
	:	
Plaintiff,	:	
	:	Civil No. 1:01-CV-0817
v.	:	
	:	(Judge William W. Caldwell)
JAMES MORGAN, et al.,	:	
	:	(M.J. Malachy E. Mannion)
Defendants.	:	

**CORRECTIONS DEFENDANTS' NUNC PRO TUNC  
MOTION FOR AN ENLARGEMENT OF TIME**

The Corrections Defendants, by and through their attorney, John J. Talaber, Assistant Counsel, Pennsylvania Department of Corrections, pursuant to Fed.R.Civ.P. 6(b) respectfully requests this Honorable Court to grant an enlargement of time until Monday, April 21, 2003, to file their Briefs in Support of their Motion for Summary Judgment and Statements of Material Facts. The following averments are made in support of this Motion:

**Parties and Nature of Action:**

1. Plaintiff Kim Smith is an inmate currently incarcerated at the State Correctional Institution at Coal Township ("SCI-Coal Township"). See Amended Complaint (doc. 20), p. 12.

2. The Department of Corrections Defendants (“Corrections Defendants”) include: (1) Kathy Allen; (2) Nancy Ambrose; (3) Mary Bernas; (4) Sharon Burks; (5) Kandis Dascani; (6) John Dunn; (7) Harry Ersek; (8) Frank Gillis; (9) Robert Glenney; (10) Robert Gooler; (11) Dr. Robyn Johns; (12) Roy Johnson; (13) Tim Jordan; (14) Bernon Lane; (15) John Learn; (16) Edward Mason; (17) Miller; (18) James Morgan; (19) Wilma Sewell; (20) Raymond Smith; (21) David Varano; (22) Voekler; (23) George Weaver; (24) Lynn Wolfgang; (25) Gerald Whysong; (26) Pat Yarger; (27) Angela Zimmerman; and (28) Hazel Zimmerman. See Amended Complaint, pp. 1-16.
3. Smith also names as Defendants Wexford Health Services, Inc. and Dr. Ronald Long, who are represented by James D. Young, Esquire. See Entry of Appearance (doc. 28).
4. In this 42 U.S.C. §1983 action, Smith alleges that the Corrections Defendants violated his First, Eighth, and Fourteenth Amendment rights under the United States Constitution. See Amended Complaint, pp. 1-16.
5. Smith is suing the Corrections Defendants in their individual capacities. See Amended Complaint, p.8.
6. Smith seeks injunctive relief, as well as, compensatory and punitive damages. See Amended Complaint, pp. 1-16.

Relevant Procedural History:

7. Smith initiated this action with the filing of a Complaint and an Application for In Forma Pauperis status on May 10, 2001. See Complaint (doc. 1); Application to proceed IFP (doc. 2).
8. The Court, by Order dated June 6, 2001, directed Smith to file an Amended Complaint on or before July 6, 2001. See Order (doc. 8).
9. On July 11, 2001, Smith filed an Amended Complaint. See Amended Complaint (doc. 20).
10. On August 3, 2001, the Court found that Smith's Amended Complaint substantially complied with its previous orders, and directed the Clerk of Court to serve process on the Defendants. See Order (doc. 24).
11. On or about September 26, 2001, the undersigned attorney waived service of summons for the Corrections Defendants.
12. On November 6, 2001, the Corrections Defendants waived their right to reply to Smith's Amended Complaint pursuant to 42 U.S.C. §1997(e). See Waiver of Reply (doc. 33).
13. On October 24, 2002, the Court granted the Defendants' Motion for discovery and dispositive motion deadlines; specifically, the Court directed that discovery be completed on or before November 12, 2002, and dispositive motions filed by December 13, 2002. (doc. 89)

14. On December 13, 2002, the Corrections Defendants' filed a Motion for Summary Judgment. (doc. 99)
15. The Court, by order dated March 12, 2003, granted the Correction Defendants' another enlargement of time until March 17, 2003 to file their Briefs in Support to the Motion for Summary Judgment. However, for the reasons that follow, the Correction Defendant's counsel is requesting a motion for enlargement of time, *nunc pro tunc*, until Monday, April 21, 2003.

Motion for Enlargement of Time Nunc Pro Tunc:

16. Fed.R.Civ.P. 6(b) provides, in relevant part:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

17. “[A] finding of excusable neglect under Rule 6(b)(2) requires both a demonstration of good-faith by the parties seeking the enlargement and also must appear that there was a reasonable basis for not complying within the specified period.” Four Seasons Securities Laws Litigation v. Bank of America, 493 F.2d 1288, 1290 (10th Cir. 1974)(finding that because the defendant acted in good faith and there was no indication that the tardiness

was part of a strategy designed to gain a tactical advantage, there was no prejudice suffered to the plaintiff from the enlargement of time.)

18. The undersigned attorney respectfully requests that the Court deem the Corrections Defendants' delay in filing the Briefs in Support to the Corrections Defendant's Motion, with the respective Statements of Material Facts, a result of his excusable neglect in this situation.
19. On February 28, 2003, counsel for the Corrections Defendants was informed that his father (age 58) has cancer (later diagnosed as lung cancer) that has moved to the bones throughout his body. Prior to this date the diagnosis was rheumatoid arthritis.
20. On Monday, March 3, 2003, counsel spent the day with his father that culminated in admitting him into the hospital, where he remains at the time of this filing.
21. The physicians and specialists treating counsel's father have informed him that the prognosis is poor, and that his father most likely has a few weeks to a month left.
22. As a result, counsel has spent a significant amount of time away from the Office with his father, but works on his caseload as time permits in the evenings and on weekends.
23. However, counsel anticipates that over the next few weeks he will continue

to be away from the Office to assist Hospice in taking care of his father, and that ultimately, he will be out of the Office at least a week sometime in April to take care of family obligations related to his father's illness.

24. Based on forgoing, counsel for the Corrections Defendants respectfully requests this Honorable Court to excuse his delay in seeking this enlargement.
25. Counsel has contacted counsel for the Wexford Defendants, James Young, Esquire, who is aware of and agrees to enlargements of time related to counsel's family situation.
26. Counsel is working with his immediate supervisors to have this matter transferred to another attorney in the Department's Office of Chief Counsel pending his anticipated absence from the Office.
27. Additional time is necessary so that the undersigned attorney and the newly assigned attorney can work together to finish the Briefs in this matter.

**WHEREFORE**, for the reasons set forth above, the Corrections Defendants respectfully request the Court to grant them an enlargement of time *nunc pro tunc* until Monday, April 21, 2003 to file their Briefs in Support to their Motion for Summary Judgment and submit their Statements of Material Facts.

Respectfully submitted,  
Office of General Counsel

BY: s/ John J. Talaber  
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PA 83279

Dated: March 19, 2003

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Defendants.	:	

**PROOF OF SERVICE**

The undersigned hereby certifies that the Corrections Defendants' Motion for an Enlargement of Time Nunc Pro Tunc was served upon the person(s) in the manner indicated below.

Service by first-class mail  
addressed as follows:

Kim Smith, CT-2162  
SCI-Coal Township  
1 Kelley Drive  
Coal Township, PA 17866-1020

Service by Electronic Case Filing:

James D. Young, Esquire  
Lavery, Faherty, Young and Patterson, P.C

s/ John J. Talaber  
John J. Talaber  
Assistant Counsel

PA Department of Corrections  
55 Utley Drive  
Camp Hill, PA 17011  
(717) 731-0444

Dated: March 19, 2003